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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. 1068 and 1069

ILLINOIS NORTHERN UTILITIES COMPANY,
Petitioner,
vs.
CITY OF GENESEO, ILLINOIS, and ILLINOIS COMMERCE COMMISSION,
Respondents.

CENTRAL ILLINOIS ELECTRIC AND GAS COMPANY,
Petitioner,
vs.
VILLAGE OF HEYWORTH, ILLINOIS, and ILLINOIS COMMERCE COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

BRIEF OF RESPONDENTS, CITY OF GENESEO AND VILLAGE OF HEYWORTH, IN OPPOSITION.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF RESPONDENTS, CITY OF GENESEO AND VILLAGE OF HEYWORTH, IN OPPOSITION.

The Decision Below.

The opinion of the Supreme Court of Illinois (R. 249) is reported at 376 Ill. 506 (Advance Opinions).

Questions Presented.

The questions presented by these cases, giving the largely hypothetical claims of petition and supporting brief the broadest possible intendment, are limited to the following:

1. Do petition and record properly present and have petitioners properly preserved any federal question of substance?

2. Assuming for argument's sake that any federal question is presented, did the Supreme Court of Illinois deny petitioners due process,

(a) By deciding judicially, on appeal from orders of an administrative body, that Illinois Commerce Commission has administrative jurisdiction and is charged with the administrative duty, under Illinois statutes and the undisputed facts in the record, to issue the orders prayed in the complaints before it,—petitioners in the same proceedings vigorously having invoked and asserted the jurisdiction of the Commission to deny such relief?

(b) By refusing, in arriving at that decision, to apply the principle of *res judicata* to certain of its own alleged prior decisions and certain alleged prior adjudications of its circuit courts?

Statement of the Case.

Petitioners have not stated the case, in either petition or brief, in such a way as to present the matter involved, and what is material to consideration of questions presented, as required by Rules 38 and 27.

Each of these cases involved the right and power, under the Illinois statutes, of an Illinois municipality to control and license the entry upon and occupation of streets, alleys and public places, and the space in, on and above

them, by an electric public utility, and to terminate such occupation and performance of utility service within the municipality, the franchise or license granted by the municipality having expired, and adequate utility service other than that furnished by the enfranchise or licensee, still operating and occupying the streets after the expiration of its franchise or license, being available.

Respondent, City of Geneseo, was organized by special legislative act approved February 16, 1865, (I, Ill. Pvt. Laws, 1865, p. 370). In 1870, Illinois adopted a constitution, section 22 of article IV of which prohibited the enactment of laws relating to municipalities except by statutes of general application. April 10, 1872, the legislature enacted a general municipal enabling act, ever since known as the Cities and Villages Act of Illinois (Laws of Ill. 1871-72, p. 218). Under that act, respondent Village of Heyworth was organized. Section 1 of article V of the original act contained no less than 96 clauses specially enumerating powers expressly granted to cities and villages formed or reincorporated under the act. This section the General Assembly repeatedly supplemented and reenacted; and also passed innumerable independent acts; all adding to and reinforcing, and none curtailing, municipal powers. August 15, 1941, by an act effective January 1, 1942, the Cities and Villages Act and nearly 200 such related statutes all were codified into and now constitute the Revised Cities and Villages Act (Ill. R. S. 1941, ch. 24, arts. 1-87). Article 1, section 5 of this statute applies the act generally to all special charter municipalities, except in case of specific conflict. This recital is declaratory of the law as construed for many years prior to the codification.

In 1913 Illinois first enacted a public utilities act (Ill. R. S. 1913, ch. 111a). This statute followed the usual plan of such statutes. It imposed upon public utilities certain duties, liabilities and prohibitions; it created a commission with administrative and quasi-judicial powers; it imposed

upon the commission the duty of supervising the public utilities and *requiring their compliance* with the statute, with *all other laws*, and with their franchise obligations; and it granted the commission administrative powers necessary for such purposes. In 1921 the statute was repealed and reenacted without substantial change (Ill. R. S. 1941, secs. 1-95, ch. 111⅔), except to create the present Illinois Commerce Commission.

As originally enacted in 1872, and by innumerable amendments since, the Cities and Villages Act granted, and still vests in municipalities, express powers which over and over again have been held by the Supreme Court of Illinois to be or to include the power to grant or refuse licenses or franchises for the occupation of streets by public utilities, to limit the duration of such licenses or franchises, to fix the terms and conditions thereof, to refuse to renew them, and to enforce the termination thereof. This was true before the Public Utilities Act of 1913; under it; and ever since its reenactment by the Public Utilities Act of 1921 (R. 202-3, 257-8). Geneseo's special charter, whether or not aided by the construction of the Cities and Villages Act now embodied in the present article 1, section 5 thereof, conferred upon that respondent powers equally broad and express. Prior to the "first Geneseo case" in 1936, there was no holding that municipal power to order off the streets utilities whose franchises had expired had been either abrogated or transferred to the Commission. The decisions of the Supreme Court of Illinois relied on as having so suggested, did not justify the construction claimed for them by petitioners and others similarly interested (R. 253-54, 256-57).

In each of the present cases the utility facilities of the petitioner first were placed in, upon, over, through the space over, and in the space above the streets, alleys and other public places of the municipality, under a license or

franchise of expressly limited duration, granted by the local municipal legislative body. In each case the license or franchise had expired by lapse of its stipulated period of duration; the respondent municipality had notified the petitioner of intention not to renew; had constructed and was operating, under powers expressly granted by statute, an adequate plant and system of its own; and had ordered petitioner to cease occupying the streets for the purpose of rendering public utility service to the inhabitants, and remove its facilities therefrom. One petitioner had a certificate of convenience and necessity issued by the Commission in 1931, covering its utility operations in respondent municipality, and the other claimed that under section 55[1] of the Public Utilities Act it was entitled to such certificate (R. 52, 138). Each petitioner, at the expiration of its local license and when ordered to remove, was still rendering public utility service to a minority of the inhabitants of the municipality, and also to a much smaller part of the inhabitants of adjacent rural territories. Each petitioner refused to remove its facilities, terminate occupation, or discontinue service within the municipality.

Each municipality then filed its complaint in the local circuit court, asking a mandatory injunction—a remedy which, theretofore, had been clearly available under numerous decisions of the Supreme Court of Illinois. *Central Illinois Public Service Co.* v. *Swartz*, 284 Ill. 108, 114; *City of Sullivan* v. *Central Illinois Public Service Co.*, 287 Ill. 19, 215 Ill. App. 606, 294 Ill. 101, 221 Ill. App. 561. In the suit brought by City of Geneseo the defendant (petitioner Northern) answered, alleging as defenses the propositions stated at page 251 of the Record here. Since both petitioners now urge that decisions based on this "first Geneseo case" are *res judicata* in the present cases, it is worth noting that in such answer Northern asserted that the suit was premature, the circuit court had no jurisdic-

1. Ill. Rev. St. 1941, ch. 111⅔, § 56.

tion, and the municipality must first apply to the commission, its specific allegation in that respect being:

> "That because of the lack of a determination by said Illinois Commerce Commission that defendant should cease furnishing electric service to the public in the plaintiff city, and in said unincorporated territory contiguous to the plaintiff city, this present suit is premature, and this honorable court is without jurisdiction to exercise an administrative function which the General Assembly of the State of Illinois by the enactment of said act concerning public utilities has vested in said Illinois Commerce Commission."

The circuit court sustained a motion to strike the answer. It was in that situation that the Supreme Court of Illinois heard Northern's appeal. As pointed out elsewhere (R. 213-14) the sole question was, Can the plaintiff maintain this action? The court held (R. 306) that whether defendant utility should discontinue service in the municipality must be determined by the Commission. In the opinion the court discussed points raised in support of the injunction, and summarized at R. 214. The decision did not incorporate the opinion, but was solely that the decree below was reversed and the cause remanded with directions to overrule the motion to strike the answer (R. 307; *City of Geneseo* v. *Illinois Northern Utilities Co.*, 363 Ill. 89, 93). Pursuant to this mandate the trial court, on bill and answer, dismissed the suit (R. 31). On the authority of the decision the proper circuit court also dismissed a similar complaint of Village of Heyworth against the other petitioner herein (R. 114-121).

The circuit courts entered these decisions in June and November, 1936 (R. 31, 119). Thereupon, in November, 1937 (R. 1, 71) each municipality filed with the Commission its separate complaint (in accordance with section 64[1] of the Public Utilities Act) against each petitioner here, seeking an order from the Commission requiring petitioner to

1. Ill. Rev. St. 1941, ch. 111⅔, § 68.

remove its facilities from and discontinue furnishing electric service within complainant municipality.

Each defendant filed a detailed answer in which, after extensive matters of inducement, and after categorical admission of the Commission's power to compel it to vacate on expiration of its local franchise (R. 4, 8, 75, 78), it set up and relied upon two defenses: (1) that the discontinuance of its utility service in and the removal of its utility facilities from the plaintiff municipality would not be in furtherance of or compatible with the public convenience and necessity, and (2) that by reason of its certificate of convenience and necessity, or right thereto, it had under the Public Utilities Act a franchise or license not terminable so long as it should be able and willing to and should furnish adequate service at fair rates, *i. e.*, that it had a vested franchise right to remain (¶¶ 15 and 16, R. 11, 12; ¶ 14 and amendment, ¶ 2, R. 79, 86). The petitioners here, in other words, invited a construction of the statutes and claimed that neither of them had violated any provision thereof.

Neither defendant anywhere in its answer, or in any other pleading, ever has alleged that its right to continue rendering utility service and maintaining its facilities was adjudicated in its favor, either by the first Geneseo case or by the decisions of the circuit courts, rendered in the one case pursuant to the mandate therein, and in the other, on the authority thereof (R. 295-6).

On the issues thus joined extensive evidence was heard by the Commission (R. 12-37, 89-127). There was, and there is, no dispute over any essential fact. There was, and there is, no indication in the record anywhere of a penny of expenditure or other legal detriment by either petitioner, in reliance on the first Geneseo case or the circuit court decisions.

The causes thus having been submitted, and thereafter

extensively briefed and argued (R. 42, 128), with the fundamental issues of the respondents' right and power to terminate utility occupation and services on expiration of local franchises, and of the Commission's obligation on complaint of the municipalities to order such termination, fully discussed throughout, the Commission, on April 26, 1939, entered separate orders denying the prayer of and dismissing each complaint. In each case, after an abridged statement of the pleadings and evidence, the Commission set out in detail its own construction of the opinion in the first Geneseo case, and the effect of the Public Utilities Act on municipal powers to license, control and terminate utility occupation of streets; and arrived at extended legal conclusions (R. 42-51, 128-37), in which its power and authority to apply the law to the undisputed facts, as well as its jurisdiction to entertain and hear the complaints, and its views of the legal merits, were developed at length.

Thereupon the Commission in each case entered findings and order (R. 51-53, 137-39) denying the prayer that the defendant be required to remove its facilities and cease utility service within the municipality, and dismissing each complaint.

Sections 67, 68 and 69 of the Illinois Public Utilities Act (Ill. R. S., 1941, ch. 111⅔, §§ 71, 72 and 73) provide in part:

> "67. * * * Within thirty days after the service of any rule or regulation, order or decision of the Commission, any party to the action or proceeding may apply for a rehearing in respect of any matter determined in said action or proceeding and specified in the application for rehearing. * * * *no person or corporation* in any appeal *shall urge or rely upon any grounds not set forth in such application for rehearing* before the Commission[1] * * *.
>
> "68. * * * any person or corporation affected by such rule, regulation, order, or decision may appeal to the circuit court * * * for the purpose of *having*

1. Italics supplied.

the reasonableness or lawfulness of the rule, regulation, order or decision inquired into and determined. * * * said appeal * * * shall be tried * * * according to the rules relating to chancery suits, so far as same are applicable.[1]

"69. Appeals * * * to the Supreme Court * * * shall be governed by the rules applying to other civil cases appealed to said Supreme Court, except that formal pleadings shall not be required."

Pursuant to Section 67, respondents here each duly applied for a rehearing before the Commission, challenging in detail, *inter alia,* the Commission's construction of the statutes, its construction of the first Geneseo case, its power to give effect to its orders thus creating the licenses or franchises claimed by the respective public utilities, and its failure to discharge its duty to order the public utilities to cease occupation of the streets under the specific mandate of the statutes (R. 54-58, 139-144).

Rehearings having been denied (R. 58, 144), each municipality appealed to the proper circuit court pursuant to Section 68. There, after hearing and argument upon the records as certified by the Commission, decrees were entered affirming the Commission's orders (R. 62, 146). The opinions of both courts (R. 66, 146) indicate clearly enough that they accepted the present petitioners' arguments that the conclusions of the Commission, legal as well as factual, were not only correct, but unescapable in view of the opinion in the first Geneseo case.

Thereupon, pursuant to Section 69, each municipality appealed the affirming order of the circuit court to the Supreme Court of Illinois, and the causes were consolidated.

Each defendant before the Commission, both circuit courts, and the Supreme Court of Illinois, vigorously asserted and invoked the jurisdiction of the Commission to make the above findings and conclusions and enter the

1. Italics supplied.

above orders, and vigorously defended the findings, conclusions and orders when made. Only when the Supreme Court of Illinois in its first opinion (R. 157) held that the decisions of the circuit courts must be reversed and the Commission's orders set aside did petitioners suggest that if the Commission had decided against rather than for them it might so have exceeded its jurisdiction as to have deprived them of property without due process (R. 165-66, 186-87). At the last stages of the proceedings on rehearing, petitioners here still asserted that the orders of the Commission should be affirmed (R. 248).

In arriving at the judgment reversing the circuit courts, review of which is sought here (R. 298-9), the Supreme Court of Illinois dealt briefly but fully with the Commission's jurisdiction (R. 267) treating it entirely as a matter of construction of local statutes. It analyzed and construed its own opinion in the first Geneseo case (R. 250-53, 255) in terms which bear no resemblance to the partisan and by no means accurate summary at pages 3-5, 7, 24-27 of the petition and brief here. Neither in this nor in its first opinion did it state, as implied on page 7 of the petition and brief, that it overruled the decision in the first Geneseo case. What it did do was to overrule any statements in the opinion in the former case, inconsistent with the views expressed in the later opinions (R. 160, 266).

Summary of Argument.

I. No federal question of substance is presented in or saved by petition or record. The validity and construction of orders of state administrative bodies, and the extent to which prior decisions of state courts are to be *res judicata* in subsequent litigation, are matters of local law, on which the decisions of the highest state court are controlling. The two alleged questions of due process now raised—consideration by the reviewing court of an issue claimed to have

been beyond the jurisdiction of the administrative tribunal whose order was being reviewed, and failure to apply the doctrine of *res judicata* to prior decisions—insofar as presented at all, first were presented on petition for rehearing. If they had any federal aspect, it was inherent in the original invocation of the Commission's jurisdiction and arose not from the decision of the Supreme Court of Illinois but at the very beginning. Such federal aspect neither was passed upon by the Supreme Court of Illinois, nor was it necessary to that court's decision.

II. Assuming, for the sake of argument only, that any federal question is presented, the Supreme Court of Illinois did not decide it adversely to previous decisions of this Court, or deny due process in the course of its decision.

A. The Supreme Court of Illinois did not exceed its appellate jurisdiction unless in remanding the cases to the circuit courts it told those courts to direct the Commission to do something which the Commission does not itself have jurisdiction to do. Under Sections 8, 9, 60, 64, 65, 75 and 79[1] of the Public Utilities Act of Illinois the Commission clearly has power and authority to entertain and hear complaints such as those of the respondents herein; and, depending on the merits, to enter the findings, decisions and orders which the Supreme Court of Illinois found erroneous in these cases or the findings, decisions and orders which the opinion of that court now directs it to enter. The Commission proceeded on complaints, due notice, answers in which petitioners did not deny but asserted and invoked the Commission's jurisdiction, full hearing, and ample provision for review and appeal. In reviewing its legal conclusions on appeal, the courts exercised purely judicial functions.

No one under such circumstances is deprived of due process merely because a determination in his favor has been reversed.

1. Ill. Rev. St. 1941, ch. 111⅔, §§ 8, 9, 64, 68, 69, 79, 83, respectively.

B. The refusal of the Supreme Court of Illinois to enforce or be bound by the earlier decisions of the circuit courts constitutes no violation of due process. Petitioners pleaded, not that their right to continue in respondent municipalities had been determined by the prior decisions and therefore was *res judicata,* but that under section 55 of the Public Utilities Act they in effect had franchises from the state, removing the necessity of local franchises and making the latter unenforceable. The Supreme Court of Illinois, as a purely local matter, adopted a different construction, both of the first Geneseo case and of the Public Utilities Act, overruling and disapproving petitioners' contentions in that behalf.

No one is deprived of due process when a state court of last resort construes its own prior decisions or its local statutes, changes such construction, or corrects its own past errors.

ARGUMENT.

I.

No Substantial Federal Question Is Set Out as the Basis of Jurisdiction. No Such Question Is Presented in or Saved by the Record.

Petitioners rest their entire case, both as to merits and as to the presence of a federal question, on two propositions:

1st. That these cases are statutory appeals from decisions of a non-judicial commission; that neither commission, nor the court on appeal had jurisdiction to do anything beside determine whether or not public convenience and necessity demanded the ouster of the petitioners; that for the court to review or discuss the decision in the first Geneseo case, and the statutes bearing on the question, was in excess of its jurisdiction, and that, therefore, when the Supreme Court of Illinois held that the Public Utilities Act had not repealed the powers granted to cities by the Cities and Villages Act, it was deciding a question that was not, and could not be, in the case, was going beyond its jurisdiction, and so was depriving petitioners of their rights without due process.

2nd. That by virtue of the decisions of the circuit courts when they obeyed the mandate of the Supreme Court of Illinois in the first Geneseo case, and dismissed the bills for mandatory injunctions, petitioners acquired vested rights to continue to occupy the streets of Geneseo and Heyworth respectively; that the decision of which review now is sought, by ignoring the rules of *res judicata*, failed to recognize these rights of petitioners, and therefore deprived petitioners of such rights without due

process of law. In order to escape the rule that *res judicata* is an affirmative defense which must be pleaded to be availed of (a rule which petitioners failed to observe) they rely on the first proposition, *i. e.*, that the only issue the commission could consider was that of public convenience and necessity; that the court, on appeal, was confined to that issue, and that, therefore, petitioners had no opportunity to present to the court their defense of *res judicata.*

Petitioners state these two propositions, in substance, on page 1 of the petition, repeat them again and again in the course of the petition and brief, and must stand or fall with their soundness or error.

The first proposition presupposes that the Illinois Commerce Commission, as an administrative agency, by disregard of the law and the issues before it, could have deprived the Supreme Court of Illinois of jurisdiction to decide a judicial question squarely presented by the record, in the face of the fact that the Court, having inherent power so to do, determined both the Commission's and its own jurisdiction and construed the statutes directly contrary to petitioners' contentions. The second assumes that the petitioners each had a vested right, not in the actual decision in the first Geneseo case or the circuit court judgments based thereon, but, rather, in a construction of that decision, which though adopted by the Commission and vigorously defended by petitioners, turned out to be contrary to the one reached by the Supreme Court of Illinois itself, after an exceptionally full and able analysis of the whole prior law on the subject.

As heretofore noted (*supra,* p. 7) in the proceedings before the Commission, each petitioner set up two defenses, the first being that public necessity and convenience did not demand its ouster (R. 11, 79); and the second, that it had a vested right to remain indefinitely (R. 12, 86).

Both petitioners, therefore, claimed before the Commission, not only that their ouster would not promote public convenience, but that they had a vested right to remain undisturbed "under the facts and circumstances here complained of" (R. 12) which was, in effect, the claim of a right to remain, regardless of necessity and convenience.

The Commission, by basing its decision on the question of public convenience, necessarily held adversely to the petitioners on their claim of vested rights.

The Supreme Court of Illinois on appeal was confronted with the same question. Not only did the Supreme Court have jurisdiction to pass on the questions decided by the Commission. It had to do so in order to dispose of the issues raised by the petitioners' answers. Before it could pass on the question of public convenience, it had to decide whether or not the petitioners could be ousted. Having, on this defense, decided adversely to the petitioners, it then disposed of the question of public convenience, as follows:

> "In a case such as the present one, where the city has a utility in full operation, capable of furnishing the public with the service heretofore required of the Company, the question of continuing in the street is not one that may be authorized by the Commerce Commission, but, * * * etc." (R. 264).

In other words, wherever a municipality has an adequate plant, public convenience does not demand the retention of the services of the utility, and it may be ousted. The Supreme Court adopted a different standard from that set up by the Commission. The latter body had held that unless public convenience *demanded the ouster* of a utility, upon the expiration of its franchise, it *could not* be ousted. The Court held that unless public convenience *demanded the retention* of the utility, it *must* be ousted when its local franchise expired.

As to the present claim that the state court ignored the

rules of *res judicata,* the real complaint of petitioners should be that the state court *did* observe those rules. Inasmuch as petitioners did not plead their defense of *res judicata,* assuming they had such a defense, they can blame no one but themselves, if the court paid no attention to it. If the pleader sets up the same defense that was set up in a prior suit, without pleading it as *res judicata,* the defense is again opened up for decision on its merits. If, therefore, petitioners are right in contending that the Supreme Court of Illinois reconsidered the first Geneseo case, and overruled it, they invited the court to do so by again presenting to it the same defense they had previously relied on, but without claiming the benefit of a former adjudication.

The court grounded its decision wholly upon its own construction of the Cities and Villages Act and related statutes and the special charter of Geneseo on the one hand, and the Public Utilities Act and amendments thereto on the other. Neither the power of the court to determine its own jurisdiction on appeals from the Commission (Petition, p. 13) nor the power of the highest state court to determine the jurisdiction of a creature of the state, such as the Commission, can possibly be called, even remotely, a federal question. Petitioners admit by their petition that they claimed a federal right but did not argue it. The very essence (a) of respondents' original petitions, (b) of respondents' petitions for rehearing before the Commission which crystalized the issues of these cases (R. 54, 139; *supra,* p. 9) and (c) of the contentions of the respondents throughout their briefs and arguments before the Commission and before each court in succession, was that neither of the petitioners had any such right as it was claiming to possess. The complaint of the petitioners here melts down to a claim that the refusal of the state to give them a right which they never possessed is a federal question and that this Court may be asked to grant

them such right as a federal sanction upon the State of Illinois.

The decisions of the highest state court upon the validity and construction of orders of state administrative boards and commissions are final here. They are matters of local law. *Hotel & R. E. Internat'l Alliance* v. *Wisconsin Employment Relations Bd.* (Mar. 2, 1942) ..... U. S. ....., 62 Sup. Ct. (adv.) 706, 708; *Ex Parte State of Texas* (Jan. 12, 1942), ... U. S. ....., 62 Sup. Ct. (adv.) 418, 421; *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 362, 365; *Alton R. Co.* v. *Illinois Commerce Comm.*, 305 U. S. 548, 554; *J. Bacon & Sons* v. *Martin*, 305 U. S. 380, 381. The Illinois court decided that it had jurisdiction in the appeals from the Commission's order to consider whether the orders were lawful, decide what the law required the Commission to do upon the particular complaints, and hold the Commission's orders invalid. All these questions are thus conclusively disposed of by the decision of which petitioners complain. Since the decision decides that the petitioners never had the vested right they sought to establish, and since they could have had that right, if at all, only by virtue of a state statute which the state court has construed against their claim, no federal quesion upon the point ever could be said to exist.

Similarly the state court has held that its former decision was not *res judicata* of any issue in the present case. The present decision is controlling on the question. *Oklahoma Packing Co.* v. *Oklahoma G. & E. Co.*, 309 U. S. 4, 8; *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358, 362-365. This Court will accord to any decision of the highest state court only the effect given to it by that court. *Wright* v. *Georgia R. & Bkg. Co.*, 216 U. S. 420, 429. This Court then will hold with the state court that there is no basis for a claim of *res judicata* or other bar or estoppel in favor of petitioners, and consequently, also,

that no federal question exists here. *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 451-452.

At the earliest prospect of state action, any prospective conflict with the Fourteenth Amendment must be brought to the attention of state authorities. This can be done before administrative as readily as before judicial tribunals. *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 309-11. But until the first opinion of the Supreme Court of Illinois the petitioners vigorously asserted and invoked the jurisdiction of the Commission to say "no" where they now assert that it is unconstitutional to say "yes". They also pleaded that they had a right to remain in respondent municipalities, which was a vested one in and of itself, not by reason of any prior adjudications. In the original answer the only reference to the federal constitution was the assertion that to oust petitioners in view of their rights under section 55 of the Public Utilities Act and the other existing circumstances would be to deprive them of property, *i. e.*, this vested right, without due process (R. 12, 86). This plea never was mentioned again by the petitioners, the Commission, either of the circuit courts, or the Supreme Court of Illinois.

No other constitutional objection was mentioned until the petition for rehearing which followed the first opinion of April 10, 1941. There for the first time petitioners asserted that there had been a "substitution of issues" (R. 165-66), and a failure of the Supreme Court of Illinois to apply the doctrine of *res judicata* (R. 174), which deprived petitioners of their property without due process in violation of section 2 of article II of the Constitution of Illinois and of the Fourteenth Amendment to the Constitution of the United States. Both these suggestions were analyzed in respondents' answer to the petition for rehearing (R. 181-87, and particularly 185-87, 207-220).

These two propositions were restated—the first, how-

ever, in different terms—in the reply to the answer to petition for rehearing (R. 228, 240-6). There petitioners asserted that the Commission's hearing a "judicial question" was a violation of both state and federal constitutions; and that failure to apply the doctrine of *res judicata* "would result in a deprivation of appellees' constitutional rights," without specifying whether state or federal rights were intended.

In its final opinion the Supreme Court of Illinois did not even mention any question under either state or federal constitution, although it dealt categorically with the first Geneseo case (R. 253-257), and with the question of the Commission's jurisdiction under the Public Utilities Act of Illinois (R. 262-5, 267), reaching conclusions as to both, as a matter of Illinois law only, directly contrary to those for which petitioners had argued.

While claims of some deprivation of constitutional right again were made when petitioners moved for reconsideration of the second and final opinion (R. 286, 287) the petitioners' main objective was to persuade the court to affirm the decision below on the basis of *res judicata* and *stare decisis* (R. 288) and all other matters, including the supposed questions on which the present applications rest, were incidental. The court in denying the motion and in releasing the order of remand (R. 297-9) did not find it necessary to advert to these claims of constitutional deprivation.

In this state of the record, no federal question is either presented or saved for this Court's consideration. On the rehearing petitioners clearly were not in a position to claim surprise or assert that they had had no reason to anticipate the court's reversal of the judgments below (R. 187). Even if the constitutional question had been fully presented by the pleadings, it was neither passed upon by, nor essential to the decision of, the state court of last resort.

The state court's interpretation of Illinois statutes is not open to review here. *Quong Ham Wah* v. *Industrial Accident Commission of California*, 255 U. S. 445, 448; *Roe* v. *Kansas*, 278 U. S. 191, 193; *Zucht* v. *King*, 260 U. S. 174, 176. Even if the court had passed specifically upon the constitutional questions, either state or federal, which petitioners by their petition for rehearing in the state court attempted to raise, its holding, if not dictum pure and simple, would have been at most an alternative or separate ground for its decision, completely distinct from that portion of the opinion which held against petitioners after construing the statutes to mean that petitioners did not have the rights which they had asserted below and which the inferior state tribunals had upheld.

The cases, in other words, have been decided by the state court on adequate non-federal grounds. The principle of *Lynch* v. *N. Y. ex rel. Pierson*, 293 U. S. 52, 54, and *Southwestern Bell Telephone Co.* v. *Oklahoma*, 303 U. S. 206, 212, controls. As said in *Lynch* v. *N. Y. ex rel. Pierson*, 293 U. S. 52, 55, this Court will not grant certiorari to review a decision of a state court of last resort unless a federal question was necessarily decided, and if the non-federal grounds were sufficient to sustain the decision there is no federal jurisdiction. As in *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 2, 3, this Court on this record will be unable to find, as justification for intervention with a writ of certiorari, that the decision of the highest court of the state did not rest on an adequate non-federal ground. To the same general effect, *Honeyman* v. *Hanan*, 300 U. S. 14, 18-23, and *N. Y. C.* v. *Central Savings Bank*, 306 U. S. 661. See also, *Fox Film Corp.* v. *Mueller*, 296 U. S. 207, 210; *Utley* v. *St. Petersburg*, 292 U. S. 106, 111, 112. In such state of the record even the fact, non-existent here, that the federal question relied on was presented by the pleadings will not aid if such question was not passed on by the state supreme court. *White*

River Co. v. *Arkansas*, 279 U. S. 692, 700; *Cochran* v. *Chicago*, 311 U. S. 610, dismissing appeal from 296 Ill. App. 645, 373 Ill. 567.

Only as to the so-called jurisdictional question do petitioners claim that their first opportunity occurred on rehearing (petition and brief, p. 13). That assertion is incorrect (R. 187). Even if the state court had considered any federal question whatever, such question was not called to its attention by adequate specifications, nor necessarily involved in the determination of the cause. Both requirements are imposed by such decisions as *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 248. Under such circumstances, the case is not within the jurisdiction of this Court as limited by section 237 of the Judicial Code, and petitioners' passing references to federal questions, not considered or necessary in reaching the state court's decision, are without consequence here. *N. Y. C. R. R.* v. *N. Y.*, 186 U. S. 269, 272; *Live Oak Ass'n.* v. *R. R. Comm.*, 269 U. S. 354, 357, 359; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 248.

Nor is any question of public policy involved in these cases. There is nothing whatever in or outside of this record to justify the attempted implication that these petitioners, or anyone else in like situation, ever have sustained any legal detriment whatever in reliance on the first Geneseo case or the 1936 circuit court decisions. Still less justification exists for the attempt (R. 175-76, 216-20, 223, 268, 282, 296) to drag before the court parties who thus far have shown no signs of sharing petitioners' concern over the results of a correct interpretation of the statutes of Illinois by the court of last resort of that state.

II.

Assuming for Argument's Sake That the Record Presents Any Federal Question, the Supreme Court of Illinois Did Not Decide It Adversely to Previous Decisions of This Court, or Deny Due Process in the Course of Its Decision.

The question decided by the Supreme Court of Illinois was, in substance, this:

> "When a city has established its own utility, which is adequate to supply the needs of the public, the utility company which previously has been serving that city, upon the expiration of its franchise, may be required to vacate the streets of the city."

This Court has decided that question adversely to the contentions of petitioners in such cases as *Detroit United Ry. Co.* v. *Detroit*, 229 U. S. 39, 46, and *Detroit United Railway Co.* v. *Detroit*, 248 U. S. 429, 436.

Not the result, but something done in the course of reaching it, therefore, must have deprived petitioners of due process if anything did.

A. The decision of the Supreme Court of Illinois that on reversal and remand taking effect the Illinois Commerce Commission will have jurisdiction to enter the orders prayed in the original complaints before it, constitutes no violation of due process.

Contrary to petitioners' statement as to the jurisdiction of the Commission (petition, p. 10) the state court of last resort has decided that the statute imposed on the Commission a duty on complaint of the municipalities, and under the facts found by the Commission and disclosed by the record, to require the petitioners to cease occupation of the streets. Such construction of a state statute by the highest court of a state is controlling. The petition

points out no violation of the Fourteenth Amendment by reason of which this Court should disturb it, or interfere with its application to these petitioners. Such construction and application were in issue from the beginning (R. 187) and petitioners could have avoided observing it only by complete somnambulance.

Assuming that the Supreme Court of Illinois could not have decided anything on review that was not within the original jurisdiction of the Commission to decide, it is difficult to see what was before the Commission if it was not just what the Supreme Court of Illinois decided. The facts were undisputed and of the sort not susceptible of serious dispute. The Commission's sole duty was to apply the law properly to those facts. What it should direct the utilities to do in view thereof was the whole issue before it. The Supreme Court of Illinois many times has held that under such circumstances it is its own duty to make sure that the Commission has applied the law properly to the facts. R. 185, and such additional cases as *Illinois Commerce Commission* v. *Chicago Railways Co.*, 362 Ill. 559, 565; *South Chicago Coal & Dock Co.* v. *Illinois Commerce Commission*, 365 Ill. 218, 225.

Both sides came before the Commission proclaiming that the question involved was the ouster of the utility under the admitted facts in each case. The cases before the Commission, the circuit courts and the Supreme Court of Illinois were tried and argued on the theory that the primary question was the right of the utilities to remain after their local franchises had expired. Sections 8, 9, 60, 64, 65, 75, and 79[1] of the Public Utilities Act of Illinois clearly confer on the Commission power to inquire into such matters. Typical is section 8, imposing the duty of inquiring whether utilities are complying with the provisions of the act and any other law, with the orders of the Commission, and with charter and franchise requirements.

1. Ill. Rev. St. 1941, ch. 111⅔, §§ 8, 9, 64, 68, 69, 79, 83, respectively.

Contrary to the assertion now made, petition and brief, p. 13, that the issue whether the petitioners should or should not be ousted was not made by the records before the Commission, the prayer of each of the complaints was, specifically, that petitioners should be ousted (R. 4-5, 75); and the answer in each case was devoted to a showing of the reasons why they should not be. If, rather than answering, petitioners had defaulted, and the orders prayed in the complaints had issued *pro confesso*, could petitioners now argue that such orders were void for want of jurisdiction, or that enforcing them would conflict with the Fourteenth Amendment?

Whether the jurisdiction of the Commission is an exclusive one as implied in the first Geneseo case (R. 306), or one concurrent with that of the circuit court, as suggested in the first opinion herein (R. 160), can make no possible difference as far as any question of due process is concerned. If the Commission had power to entertain and hear the petitions and answers (as petitioners repeatedly have asserted that it had), it must have had full authority to apply the proper rule of law to uncontroverted facts, and committed legal error for which the right of review was the remedy, when it failed to do so. To limit this authority to "convenience and necessity" only would be to cut off entirely the respondents' right to have a hearing anywhere on the question whether the utilities should go as required by their local franchises, or stay by virtue of the rights asserted under the utilities act, and especially § 55 thereof. That this is the petitioners' objective is sufficiently indicated by the fact that, notwithstanding the Commission's asserted want of power to deal with the petitioners' rights under the local franchises as compared with those under the certificate of convenience and necessity, which one of them had and the other asserted that it was entitled to, they still are insisting of record that the orders of the circuit courts, confirming the extended findings, conclusions and orders of the

Commission on that very subject matter, ought to be affirmed (Reply to answer to petitions for rehearing, R. 248).

The complaints and answers before the Commission put in issue every vestige of right the petitioners possessed with respect to occupation of the municipal streets, the jurisdiction, powers, and duties of the Commission, and the construction of the applicable statutes. The Commission's order acknowledged that the complaint was made to compel the public utility to terminate occupation of the streets (Finding (7), R. 52-53, 138) but construed the law as meaning that there was no provision in the Public Utilities Act empowering the Commission to act pursuant to the prayer of the complaint (Finding (8), R. 53, 138). The respondents' petitions for rehearing (R. 54, 139) preserved all issues of law for appeal.

In this situation, the Supreme Court of Illinois upon appeal construed the statutes and the powers and duties of the Commission under the law in a manner highly derogatory, both to the petitioners' contentions and to the Commission's own views. In doing so, the court exercised only judicial functions. *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, 131; *Federal Radio Com.* v. *Nelson Bros. B. & M. Co.*, 289 U. S. 266, 276, 277, 278; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 345. Review of an administrative determination requires consideration of every question of law (*Anniston Mfg. Co.* v. *Davis, supra*) and determination whether the proper rule of law has been correctly applied (*Hormel* v. *Helvering*, 312 U. S. 552, 555, 556, 557). The petitioners have confused the Commission's jurisdiction based upon the statute, to entertain and hear, with the entirely different matter of what the Commission did on having entertained and heard. In its every act, the Commission must venture a construction of the statute from which its authority is de-

rived. *Powell* v. *United States,* 300 U. S. 276, 287; *Hormel* v. *Helvering,* 312 U. S. 552, 556. Such approach to the judicial question is not conclusive on the appropriate court, acting judicially. *American School of M. H.* v. *McAnnulty,* 187 U. S. 94, 110, 111; *Johnson* v. *Towsley,* 13 Wall. 72, 82-86; *The Chicago Junction Case,* 264 U. S. 258, 264, 265; *Hormel* v. *Helvering, supra.* The doctrine of administrative finality which petitioners advance is applicable only to questions of primary, evidentiary, and circumstantial facts, never to questions of law. *Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 481, 491; *Federal Communications Com.* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 145; *Powell* v. *United States, supra; Anniston Mfg. Co.* v. *Davis, supra.* The power of an administrative board will not be deemed to include refusal to perform an act which the statute, as construed by the state court of last resort, enjoins upon it under the facts and circumstances as found or admitted by such board. *Dismuke* v. *United States,* 297 U. S. 167, 172, 173; *United States ex rel. Louisville C. Co.* v. *Interstate Com. Com.,* 246 U. S. 638, 643.

If, as in such cases as *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 426, a party is in court for a limited but not a general purpose, it may be a denial of due process to give general relief against him. But no more before an administrative tribunal than before a court may he concede, assert and invoke jurisdiction if the result be favorable, but claim the benefit of the Fourteenth Amendment if it be adverse. On appeal he may not, vigorously and throughout several hundreds of pages of record and briefs and extended oral argument, contend that a favorable administrative result should be affirmed, and then, when the reviewing court reverses, assert that it has deprived him of due process.

The requisites of due process are satisfied when a tribunal (either judicial or administrative) having jurisdiction proceeds, in accordance with due notice and opportunity to

be heard, to decide a matter within the scope of its common law or statutory jurisdiction on the one hand, and of the controversy before it on the other. The cases cited by petitioners, notably on pp. 15-16, 23-24, of its petition and brief, are not to the contrary, as the footnotes to this Court's opinion in *Brinkerhoff* v. *Hill,* 281 U. S. 673, 680-81, plainly indicate. Some of the earlier decisions of this Court to this effect are collected in *Asbury Truck Co.* v. *R. R. Com.,* 52 Fed. (2d) 263, 268-69, and in the affirmance, 287 U. S. 570. The same general principles have been applied in such more recent cases as *West Ohio Gas Co.* v. *Public Util. Com.,* (1) 294 U. S. 63, 70; *West Ohio Gas Co.* v. *Public Util. Com.,* (2) 294 U. S. 79, and *Los Angeles Gas & Electric Corp.* v. *Ry. Comm.,* 289 U. S. 287, 304. The same is true, under state constitutions, by innumerable decisions of state courts; and there is no exception thereto.

If the jurisdiction exists and a hearing on due notice be had, then the result arrived at in such proceedings may be ever so erroneous on the merits, from the point of view of the defeated parties, yet no denial of due process will result, whether or not, as to the merits, the reviewing court agree with them. *Consolidated Edison Co. of New York* v. *National Labor Relations Board,* 95 Fed. (2d) 390, 395, 305 U. S. 197, 228-29; *Tisi* v. *Tod,* 264 U. S. 131, 133; *Kishan Singh* v. *Carr,* 88 Fed. (2d) 672, 679-80.

B. Refusal of the Supreme Court of Illinois to apply the rule of res judicata to the circuit court judgments entered in the former ouster suits, was no violation of due process.

The Supreme Court of Illinois held (and in so doing had the support of settled prior law, state and federal) that the first Geneseo decision was neither a bar or estoppel by judgment nor an estoppel by verdict (*Svalina* v. *Saravana,* 341 Ill. 236, 247-49; *Chicago Theo. Sem.* v. *People,* 189 Ill. 439,

451; *Cromwell* v. *Sac County,* 94 U. S. 351, 354-58); permitted a fresh trial in a proper forum after the dismissal (*Fleming* v. *Dillon,* 370 Ill. 325, 330-31; *Braude* v. *Wardy,* 340 Ill. 180, 186; *Peek* v. *Woman's Home Missionary Soc.,* 293 Ill. 337, 349-50; *St. Boniface R. C. Church* v. *Wolf,* 302 Ill. 204, 206; *Bierce* v. *Hutchins,* 205 U. S. 340, 346, 347; *Southern P. R. Co.* v. *Bogert,* 250 U. S. 483, 490); and could not have decided issues which were then moot or which might arise in future proceedings (*National Jockey Club* v. *Illinois Racing Com.,* 364 Ill. 630, 631-32; *Railway Express Agency* v. *Illinois Commerce Com.,* 374 Ill. 151, 156; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324, 325). In so doing it acted in accordance with the rules of construction announced in *Rogers* v. *Hill,* 289 U. S. 582, 587.

On the merits, therefore, this question like that of the Commission's jurisdiction, is settled as a local matter. It is not a subject of federal concern unless by the prior decisions the petitioners acquired something, of a substantive character, to deprive them of which, by later orders or decisions, will violate or impair their rights under the federal constitution. Otherwise stated, have they a vested right, to be disturbed only at cost of bringing the Commission and the courts of Illinois into conflict with the Fourteenth Amendment, in that interpretation of the first Geneseo case upon which the Commission relied—and in the previous errors of the Supreme Court of Illinois, to the extent that decision was wrong?

A party to litigation may not acquire any such vested right in either decision or doctrine of the judicial department, especially in cases of this character.

As pointed out below (R. 218) the only fundamental question before the Supreme Court of Illinois was to which of two delegees the legislature had committed certain legislative powers in respect of the use of streets and public places and the rendering of utility service, within municipalities, by public utilities. Respondents claimed that petitioners had local franchises which had expired and which by their terms as well as by applicable statutes, ordinances and judicial decisions required petitioners to vacate and cease rendering utility service. Petitioners, on the other hand, contended that by virtue of section 55 of the utilities act they had what amounted to franchises from the state, under which the municipalities originally enfranchising them could not terminate their occupation and services at all, and under which even the Commission on the municipalities' complaint could so terminate only on affirmative proof, with the burden on respondents, that public convenience and necessity positively required them to go. In the first Geneseo case the Supreme Court of Illinois held that the Commission was a proper tribunal to settle the argument; and in these cases, that nothing else it said in that case was essential to its decision there.

How then could any right be vested in petitioners by the prior decisions or divested, *contra* Constitution, by the present ones? Whether the delegee of legislative authority be the Commission or the local municipal legislative body, that delegee was in either case dealing with a mere license to transact in a certain place a business affected with a public interest. Unless the grant be one in perpetuity there can be no vested right under such circumstances. The Supreme Court of Illinois has held repeatedly that a cer-

tificate of convenience and necessity confers no vested right. *R. R. Express Agency* v. *Com. Comm.*, 374 Ill. 151, 155-56. So long as there be notice and hearing, refusing or revoking a license or franchise is not a violation of due process. *Semler* v. *Ore. State Board of Medical Examiners*, 294 U. S. 608, 610-11; *State* v. *North*, 271 U. S. 40, 41-43; *Monamotor Oil Co.* v. *Johnson*, 3 Fed. Supp. 189, 202, 292 U. S. 86, 97; *Technical Radio Laboratory* v. *Federal Radio Com.*, 36 Fed. (2d) 111, 114.

It is even more fundamental, even elemental, that on expiration of a franchise the enfranchisee is not denied due process by being required to cease operating and remove its property. *Detroit United Ry.* v. *City of Detroit*, 229 U. S. 39, 45-46; *Scott County Road Co.* v. *Hines*, 215 U. S. 336, 339; *State* v. *Mo. Utilities Co.*, 339 Mo. 385, 96 S. W. (2d) 607, 618; *Detroit United Ry.* v. *City of Detroit*, 255 U. S. 171, 177.

Of course, petitioners cannot have any vested right in judicial decisions as such, especially if the highest state court shall later decide that they were misunderstood or erroneous. *Fleming* v. *Fleming*, 264 U. S. 29, 31, and *Tidal Oil Co.* v. *Flanigan*, 263 U. S. 442, 450-54, are among this Court's numerous decisions to this effect. The Supreme Court of Illinois has followed this construction, *Prall* v. *Burckhardt*, 299 Ill. 19, 42. Record herein, pp. 218-19.

Conclusion.

The decision of the Supreme Court of Illinois is correct and involves no error of law. That court has decided no federal question, substantial or otherwise, not heretofore determined by this Court, nor has it decided any such question in a way probably not in accord with applicable decisions of this Court. There is here no question justifying issuance of a writ of certiorari under Section 5 (a) of

Rule 38, or any of the other rules laid down to govern the granting of such writs. The petition should be denied.

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